Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

DANIEL P. DORGAN,

Petitioner,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WAS IT ERROR FOR THE COURT OF APPEALS TO AFFIRM THE DECISION OF THE DISTRICT COURT TO RETAIN JURISDICTION OVER THIS CASE AND DISMISS PETITIONER'S CLAIMS WITH PREJUDICE AFTER THE PETITIONER HAD FILED AND SERVED A FED. R. CIV. P. RULE 41(a)(1) NOTICE OF DISMISSAL AND THE RESPONDENT HAD NOT PREVIOUSLY FILED NOR SERVED AN ANSWER OR A MOTION FOR SUMMARY JUDGMENT?

II. WAS IT ERROR FOR THE COURT OF APPEALS TO AFFIRM THE DISTRICT COURT'S ORDER DENYING PETITIONER'S 28 U.S.C. § 1406(a) MOTION TO TRANSFER VENUE BASED ON THE FORUM SELECTION CLAUSE CONTAINED IN THE EMPLOYMENT CONTRACT BETWEEN PETITIONER AND RESPONDENT?

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PETITION

Petitioner respectfully petitions for a writ of certiorari to review the unpublished decision of the United States Court of Appeals for the Eighth Circuit which affirmed the district court's order dismissing petitioner's claims with prejudice.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Eighth Circuit in *Daniel P. Dorgan v. Sprint/United Management Company*, which was filed on May 18, 2000, is set forth in the Appendix hereto (App. A-1).

The order of the United States Court of Appeals for the Eighth Circuit in *Daniel P. Dorgan v. Sprint/United Management Company* denying petitioner's petition for rehearing and for rehearing *en banc*, which was filed on June 28, 2000, is set forth in the Appendix hereto (App. A-11).

The May 12, 1999, order of the United States District Court for the District of Minnesota in *Daniel P. Dorgan v. Sprint/United Management Company* which dismissed petitioner's claims with prejudice is set forth in the Appendix hereto (App. A-3)

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Eighth Circuit affirming the district court was filed on May 18, 2000 (App. A-1). The Court of Appeals entered an order denying a timely filed petition for rehearing and petition for rehearing *en banc* on June 28, 2000 (App. A-11).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1406(a)–Transfer of Venue:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Fed. R. Civ. P. Rule 12(b)(6) (1998)–Dismissal for Failure to State a Claim:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted,... A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense number (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. Rule 41(a)(1)(1998)–Notice of Dismissal:

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (I) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

United States District Court for the District of Minnesota-Local Rule 7.1(b)(2) (A)-(D)–Civil Motion Practice:

Local Rule 7.1–Civil Motion Practice:

...(b) Dispositive Motions. Unless otherwise ordered by the district judge, dispositive motions in any civil case shall be heard by the judge to whom the case is assigned. Motions for injunctive relief, summary judgment, to dismiss, and to certify a class action are considered dispositive motions for the purpose of this rule. <u>This rule does not govern post-trial or post-judgment motions,</u>

...

(2) Represented Parties. Counsel are required to file dispositive motions and supporting documents ONLY AFTER the motion is fully briefed by all parties pursuant to time limitations as set forth in Local Rule 7.1(b)1.

This procedure is not to be used for motions concerning discovery, pro hac vice admissions, amendments to pleading, habeas corpus or pro se Litigation. For these matters, the motion practice outlined in Local Rules 7.1(a) and 7.1(b)1 will be followed.

(A) Moving Party; Supporting Documents. A cover letter must accompany motion papers delivered to all parties informing them of the motion. Two copies of this letter shall be delivered to the Clerk of Court who shall file one copy in the case file and forward one copy to the judge. This allows the Court to acknowledge and follow the status of the motions. For example, receipt of such a letter will be sufficient to alter the time for filing a responsive pleading (such as an answer) pursuant to Fed. R. Civ. P. 12(a)(b).

The moving party shall deliver one copy of the following documents to opposing counsel, and retain the original and two copies for later filing with the Court:

1. Motion
2. Memorandum of Law
   The memorandum shall contain a title page designating the title and file number of the action and clearly indicate whether oral argument is requested.
3. Affidavits and Exhibits
   Affidavits and exhibits shall not be attached to the memorandum of law, but shall be filed separately. Exhibits filed without a corresponding affidavit must contain a separate title page.
4. Proposed Order

(B) Responding Party; Supporting Documents. Within 21 calendar days after service of the dispositive motion papers, any party responding to the motion shall deliver one copy of the following documents to opposing counsel, and in addition provide opposing counsel with the original and two copies for later filing with the Court. If the opposing papers cannot be prepared within said 21 calendar days, the parties may agree, without leave of Counsel, to a reasonable extension. If the parties cannot so agree, they should contact the calendar clerk of the appropriate judge to establish a schedule.

1. Memorandum of Law
   The memorandum shall contain a title page designating the title and file number of the action and clearly indicate whether oral argument is requested.
2. Affidavits and Exhibits
   Affidavits and exhibits shall not be attached to the memorandum of law, but shall be filed separately. Exhibits filed without a corresponding affidavit must contain a separate title page.

(C) Reply Memorandum. Within 7 calendar days after service of the opposing papers or on or before the date set by stipulation or order, whichever is later, the moving party may submit a reply memorandum of law by delivering one copy to opposing counsel, and by retaining the original and two copies for later filing with the Court. If the reply papers cannot be prepared within said time limits, the parties may agree, without leave of Court, to a reasonable extension. If the parties cannot so agree, they should contact the calendar clerk of the appropriate judge to establish a different date for service of the reply papers.

(D) Moving Party; Filing of All Motion Papers. It is the responsibility of the moving party to submit all documents referenced in LR 7.1(b)(2)(A),(B) and (C), in chronological order, to the Clerk of Court for filing on or before the date established by a pretrial order pursuant to LR 16.2(c)(4), for the filing of dispositive motions. After the motion has been fully briefed and is ready for submission to the Court, pursuant to LR 7.1(b)(2)(D), counsel shall obtain a hearing date for the motion from the calendar clerk of the appropriate judge that is at least 16 calendar days from the date of filing of the papers unless the parties agree to a later date or the Court establishes a different date. The moving party shall then prepare a Notice of Motion with said hearing date and serve same upon other counsel with the Clerk of Court.

All original documents (briefs in support, in opposition, or in reply) plus two copies of each document and a cover letter separately listing each document submitted and the Notice of Motion shall be sent to the Clerk of Court for filing in correct order of occurrence.

STATEMENT OF THE CASE

Petitioner, Daniel P. Dorgan, was employed by respondent, Sprint/United Management Company, from October 1988 to December 1995. Petitioner's compensation was based on an "incentive compensation" plan respondent prepared that was part of Sprint's employment agreement with petitioner. In late April or early May 1993, respondent revised its incentive compensation plan and applied the revisions retroactively. The revisions retroactively reduced petitioner's compensation by an estimated $300,000. Petitioner filed a lawsuit in September 1998 to recover his unpaid incentive compensation.

Respondent did not serve or file an answer. Instead, in October 1998 respondent sent petitioner a two-page notice of motion and motion to dismiss the case under F.R.C.P. Rule 12(b)(6) for failure to state a claim for which relief can be granted, or in the alternative, for summary judgment under F.R.C.P. Rule 56 (App. A-12). Respondent did not serve or file a memorandum of law, affidavit or any other motion documents with the notice of motion and motion, as required by United States District Court for the District of Minnesota Local Rule 7.1. Those documents were served in December 1998. Respondent did not file the notice of motion and motion with the court until December 1998.

On November 20, 1998, petitioner served and filed a Notice of Dismissal, pursuant to F.R.C.P. Rule 41(a)(1) (App. A-15). On November 25, 1998, respondent's attorney sent a letter to the court objecting to petitioner's Notice of Dismissal (App. A-16). On December 1, 1998, petitioner's attorney sent the court a letter responding to respondent's letter and requesting that, if the case had not been dismissed without prejudice, that it be so dismissed (App. A-19).

The court sent the parties' attorneys a letter on December 7, 1998, stating that if the parties could not agree on an order of dismissal, the parties should proceed by way of formal

motion (App. A-22). The district court thus indicated it was retaining jurisdiction of the case, notwithstanding petitioner's Rule 41(a)(1) Notice of Dismissal. The court also sent the parties a Report and Recommendation in another case which discussed dismissals without prejudice. The Report and Recommendation indicated that, if a case was dismissed without prejudice, the court would grant all of the defendant's attorney's fees and costs as a condition to the plaintiff's refiling of the case (App. A-24).

On December 14, 1998, petitioner amended his complaint, pursuant to F.R.C.P. Rule 15(a). On January 6, 1999, petitioner served and filed a motion to transfer venue to Missouri, based on the forum selection clause in the agreement that had been provided to petitioner after the lawsuit was started. On January 7, 1999, respondent filed its motion to dismiss pursuant to F.R.C.P. Rule 12, or for summary judgment. On January 20, 1999, a hearing was held on the parties' motions. After supplemental memoranda were served and filed, the court issued a report and recommendation that petitioner's motion to dismiss without prejudice be granted, on the condition that petitioner pay respondent $3,280 in attorney's fees and costs prior to refiling the case (App. A-24). Respondent objected to the report and recommendation.

The district court judge did not follow the report and recommendation of the magistrate judge and, instead, dismissed the case with prejudice on May 12, 1999 (App. A-3). The dismissal was based on respondent's statute of limitations defense. Petitioner filed his appeal on June 8, 1999. The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court in an unpublished opinion that was filed on May 18, 2000 (App. A-1). The court of appeals denied petitioner's petition for rehearing and rehearing *en banc* on June 28, 2000.

The basis for the district court's jurisdiction in the first instance was diversity of citizenship – 28 U.S.C. § 1332.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT, THE EIGHTH CIRCUIT, AND OTHER CIRCUITS.

A. The Court of Appeals' holding that the district court properly retained jurisdiction of this case even after the petitioner had filed his Rule 41(a)(1) Notice of Dismissal is directly contrary to well-established precedent throughout the country.

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), this Court recognized a plaintiff's right to automatically dismiss a case by filing a Rule 41(a)(1) notice of dismissal before a defendant has filed an answer or a motion for summary judgment. In *Cooter & Gell*, the Court stated:

> Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before a defendant files an answer or motion for summary judgment and only if the plaintiff has never previously dismissed an action 'based on or including the same claim.'

496 U.S., at 394.

In his concurring opinion in *Cooter & Gell*, Justice Stevens noted the following about Rule 41 (a)(1):

> The Rule is designed to further the just decision of cases in two significant ways. First, by providing that a second voluntary dismissal is an adjudication

> on the merits, and the first such dismissal is without prejudice only if the dismissal precedes the filing of an answer or a motion for summary judgment. Rule 41(a)(1) satisfies the interest in preventing the abusive filing of repetitious, frivolous lawsuits. Second, and of equal importance, by giving the plaintiff the absolute, unqualified right to dismiss his complaint without permission of the court or notice to his adversary, the framers of Rule 41(a)(1) intended to preserve the right of the Plaintiff to reconsider his decision to file suit 'during the brief period before the defendant had made a significant commitment of time and money.'

496 U.S., at 410.

In the present case, the court of appeals' decision that the Rule 41(a)(1) Notice of Dismissal which was filed by the petitioner did not automatically dismiss the case is an incorrect interpretation of Rule 41(a)(1) and flies in the face not only of precedent in other circuits but also of other precedent in the Eighth Circuit. To maintain that the two-page Rule 12(b)(6) motion that was served – but not even filed – by the respondent defeated petitioner's right of automatic dismissal effectively turns Rule 41(a)(1) into a nullity and takes away one of the very rights the rule was designed to protect: the right of a plaintiff to automatically terminate a case at what is contemplated by the rule would occur at an early stage of the proceedings.

In *Safeguard Business Systems, Inc. v. Hoeffel, Inc.*, 907 F.2d 861 (8th Cir. 1990), the Eighth Circuit noted that Rule 41(a)(1) left no discretion with a court as to whether a case had been dismissed upon the filing of a Rule 41(a)(1) Notice of Dismissal. The court of appeals stated that a court need only consider whether a defendant had filed an answer or a summary judgment motion prior to the filing of a Rule

41(a)(1) Notice of Dismissal. If not, dismissal was automatic. 907 F.2d, at 863. See also, *Foss v. Federal Intermediate Credit Bank of St. Paul*, 808 F.2d 657, at 659-60 (8th Cir. 1986); *In re Piper Aircraft Dist. Sys. Antitrust Lit.*, 551 F.2d 213, at 220 (8th Cir. 1977).

In *Kurkowski v. Volcker*, 819 F.2d 201 (8th Cir. 1987), the Eighth Circuit noted that a defendant's motion to dismiss was not converted into a motion for summary judgment until matters outside the pleadings were submitted to the court. 819 F.2d, at 203. Here, nothing outside the pleadings had been submitted to the court prior to petitioner's service and filing of his Rule 41(a)(1) Notice of Dismissal. In fact, respondent's Rule 12(b)(6) motion to dismiss had not even been filed with the court prior to the filing of petitioner's notice of dismissal.

Although Rule 41(a)(1) provides for an automatic dismissal unless the defendant has filed an answer or a summary judgment, courts have used Rule 12(b)(6) for guidance in determining whether a motion to dismiss has turned into one for summary judgment. For example in *Finley Lines Jt. Protect. Bd. v. Norfolk So. Corp.*, 109 F.3d 993 (4th Cir. 1997), the Fourth Circuit noted the following:

> Rule 12(b)(6) does not provide that a motion to dismiss supported by materials outside the pleadings shall be treated as one for summary Judgment when 'filed' with the court or when 'served' on a party. Rather, the rule expressly states that a motion to dismiss supported by such materials 'shall be treated' as a summary judgment motion only when the materials are 'presented to and not excluded by the district court.'

109 F.3d, at 995-96. The court of appeals thus concluded that mere submission of extraneous materials did not convert a

Rule 12(b)(6) motion into one for summary judgment. *Id.*, at 996.

Other circuits have taken the same approach as in *Finley Lines*: that mere submission of extraneous material does not transform a Rule 12(b)(6) motion into one for summary judgment. See, e.g., *Aamot v. Kassel,* 1 F.3d 441 (6th Cir. 1993.) However, other circuits have also taken the position that attaching extraneous materials to Rule 12(b)(6) motions turns them into summary judgment motions and that simply serving such motions defeats subsequent Rule 41(a)(1) notices of dismissal. See, e.g., *Wilson v. City of San Jose*, 111 F.3d 688, at 692 (9th Cir. 1997) ("a plaintiff may dismiss his action so long as the plaintiff *files* a notice of dismissal prior to the defendant's *service* of an answer or motion for summary judgment); *Kurkowski v. Volcker*, *supra*, at 203; *Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, at 661 (5th Cir. 1979). Whichever standard the district court and court of appeals should have applied here, it is clear that respondent had neither served nor filed a summary judgment motion before petitioner filed his Rule 41(a)(1) Notice of Dismissal.

This case is important, not only because petitioner's $300,000 claim was dismissed with prejudice but also because the Court can and should set a uniform standard as to when a Rule 12(b)(6) motion turns into a summary judgment motion so as to defeat a subsequent Rule 41(a)(1) notice of dismissal. Although the rules may seem clear in their wording, the way the circuit courts have interpreted them has been inconsistent.

B. The Court of Appeals' holding that the District Court properly denied petitioner's 28 U.S.C. § 1406(a) motion to transfer venue based on the enforceable forum selection clause in petitioner's agreement with respondent contradicts Supreme Court and Eighth Circuit precedent.

Even if the court of appeals was correct in affirming the district court's retention of jurisdiction notwithstanding petitioner's Rule 41(a)(1) Notice of Dismissal, the court of appeals contradicted clear legal precedent in affirming the district court's denial of petitioner's § 1406(a) motion to transfer venue based on the forum selection clause in the parties' employment agreement.

In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), this Court held that the Ninth Circuit Court of Appeals had erred in reversing the district court's dismissal of the case in which a forum selection clause required that an action against the petitioner there had to be brought in Florida. 499 U.S., at 597. Although the Supreme Court noted that forum selection clauses contained in form passage contracts were subject to judicial scrutiny, the Court noted that the forum selection clause passed the fundamental fairness test and was enforceable. *Id.*, at 595.

Here, the forum selection clause compelled petitioner to institute an action against respondent in Missouri. Petitioner was not aware of the existence of the forum selection clause prior to instituting the lawsuit. Nevertheless, the court of appeals affirmed the district court's denial of petitioner's § 1406(a) motion to transfer venue based on the forum selection clause and the dismissal of petitioner's claims with prejudice. In affirming the district court, the court of appeals contradicted the recent precedent it had set in *M. B. Restaurants, Inc. v. CKE Restaurants, Inc.*, 183 F.3d 750 (8th Cir. 1999).

In *M. B. Restaurants*, the court of appeals affirmed the district court's dismissal of an action for improper venue, since the applicable forum selection clause required the case to have been instituted elsewhere. *Id.*, at 753. The court of appeals stated that forum selection clauses were prima facie valid and were enforced unless they were unjust, unreasonable or invalid because of fraud or similar reason. *Id.*, at 752. The court of appeals further noted that the fact the contract was a form contract and not negotiated did not invalidate the clause. *Id.*, at 753. Yet, in the present case, the court of appeals completely contradicted its *M. B. Restaurants* decision by refusing to disagree with the district court's failure to consider the enforceability of the forum selection clause here.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-2660

Daniel P. Dorgan,	*	
	*	
Appellant,	*	Appeal from the United States
	*	District Court for the District
v.	*	of Minnesota.
	*	
Sprint/United Management Company,	*	[UNPUBLISHED]
	*	
	*	
Appellee.	*	

Submitted: May 11, 2000

Filed: May 18, 2000

Before WOLLMAN, Chief Judge, FAGG, Circuit Judge, and HENDREN,* District Judge.

PER CURIAM.

---

* The Honorable Jimm Larry Hendren, Chief Judge, United States District Court for the Western District of Arkansas, sitting by designation.

Daniel P. Dorgan appeals the district court's rulings refusing to transfer venue, dismissing the action with prejudice, and denying Dorgan's motion to dismiss without prejudice. Having reviewed the record in the context of Dorgan's contentions, we conclude that no error of law appears in the district court's rulings and that an extended discussion is unnecessary. We thus affirm the judgment of the district court. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 98-2078 (DSD/JMM)

Daniel P. Dorgan,

Plaintiff,

v. **ORDER**

Sprint/United Management Company,

Defendant.

John R. Dorgan, Esq and Dorgan Law Office, 1518 Lake Street East, Suite 210, Minneapolis, MN 55407, counsel for plaintiff.

John M. Elliott, Esq., Sandra L. Schlafge, Esq. and Halleland, Lewis, Nilan, Sipkins & Johnson, 220 Sixth Street South, Suite 600, Minneapolis, MN 55402, counsel for defendant.

This matter is before the court on the objections of defendant Sprint/United Management Company ("Sprint") to the report and recommendation of Magistrate Judge John M. Mason dated April 6, 1999. In his report, the magistrate judge recommended that the court: (1) deny plaintiff Daniel P. Dorgan's motion to transfer; (2) grant Dorgan's motion to dismiss without prejudice under Federal Rule of Civil Procedure 41(a)(2), on the condition that, before refiling the action, Dorgan certifies that he has paid Sprint the sum of $3,280; and (3) deny as moot Sprint's motion under Rules 12 and 56 for dismissal or summary judgment. Sprint objects to the recommendation to dismiss without prejudice, contending

that it has established a viable statute of limitations defense that requires the court to dismiss Dorgan's suit with prejudice.

BACKGROUND

Plaintiff Daniel P. Dorgan was employed by defendant Sprint from October 1988 to December 1995. Prior to 1993, Dorgan's compensation package included an incentive compensation plan, which tied his pay to the amount of business his clients did with Sprint. In 1993, the terms of this compensation plan were twice modified. Dorgan alleges that these modifications altered the compensation scheme in such a way as to dramatically reduce the amount of money that he was owed under the terms of the original plan. Specifically, Dorgan alleges that he was underpaid by $300,732.

On September 18, 1998, Dorgan filed this diversity action in federal court, bringing claims for breach of contract, unjust enrichment, and quantum meruit. Dorgan also alleged that venue was proper in Minnesota. On October 8, 1998, Sprint served a summary judgment motion based on the Minnesota's statute of limitations. On November 20, 1998, plaintiff filed a motion to voluntarily dismiss pursuant to Rule 41(a)(1), which the magistrate later construed as a motion under Rule 41(a)(2). On December 14, 1998, Dorgan served an amended complaint, incorporating information he had received regarding a forum selection clause contained in some of the compensation plans at issue. In his amended complaint, Dorgan alleged that venue was proper either in Minnesota or in the state or federal courts of Jackson County, Missouri. On December 22, 1998, Dorgan filed a motion to transfer venue to the Western District of Missouri pursuant to 28 U.S.C. § 1404. On January 20, 1999, the magistrate judge held a hearing on the pending motions, during which Dorgan converted the statutory basis for his transfer motion to 28 U.S.C. § 1406. After the hearing, the parties provided supplemental briefs on the § 1406 issue. On April 6, 1999, the

magistrate judge issued the report recommending that the court dismiss Dorgan's suit without prejudice pursuant to Rule 41(a)(2).

DISCUSSION

Rule 41(a)(2) provides that after a defendant has responded to a complaint, the "action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." The primary purpose behind this rule is to prevent voluntary dismissals that prejudice the defendant. See Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984). With an eye toward this goal, the court considers the following factors when evaluating a plaintiff's motion under Rule 41(a)(2):

> (1) the defendant's effort and the expense involved in preparing for trial, (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, (3) insufficient explanation of the need to take a dismissal, and (4) the fact that a motion for summary judgment has been filed by the defendant.

Witzman v. Gross, 826 F.2d 780, 783 (8th Cir. 1987). Here, Sprint has clearly demonstrated that it will be prejudiced under each of these factors if the Rule 41(a)(2) motion is granted. As the magistrate judge observed:

> In this case, the Motion to Transfer was not made until after defendant had made a Motion to Dismiss. When the desire to transfer or dismiss was first made known, proceedings were still at a relatively preliminary stage. Nonetheless, Defendant had already incurred substantial expense. These expenses were increased by continued activity of counsel for

Plaintiff in the District of Minnesota, including the filing of an Amended Complaint.

Report & Recommendation at 7 (Apr. 6, 1999).

Further, Sprint has demonstrated that a Rule 41(a)(2) dismissal would allow Dorgan to avoid Sprint's valid statute of limitations defense. The Eighth Circuit has stated that "there is clear legal prejudice where a Rule 41(a)(2) dismissal is granted in the face of a valid statute of limitations defense." Metropolitan Federal Bank of Iowa v. W.R. Grace & Co., 999 F.2d 1257, 1262 (8th Cir. 1993) (also stating that "[w]e would consider it an abuse of discretion for a district court to find no legal prejudice, and thus to grant voluntary dismissal, where the nonmoving party has demonstrated a valid statute of limitations defense to the claims sought to be dismissed").

With to respect to its statute of limitations defense, Sprint argues that Minnesota law should govern in this case. Dorgan, on the other hand, contends that Missouri law should control, basing his argument on choice of law language contained in some of the compensation plans at issue. A federal court sitting in diversity applies the choice of law principles of the state in which it sits. See Minnesota Mining and Mfg. Co. v. Kirkevold, 87 F.R.D. 324, 331 (D. Minn. 1980). When conducting a choice of law analysis under Minnesota law, the court's threshold task is to decide whether the choice of one state's law over another creates an actual conflict. See Jepson v. General Cas. Co. of Wis., 513 N.W.2d 467, 469 (Minn. 1994). If an actual conflict is discerned, the court's next step is to determine whether the law involved is procedural or substantive. See Gate City Fed. Sav. & Loan Ass'n v. O'Connor, 410 N.W.2d 488, 450 (Minn. App. 1987). If the court concludes that the law involved is procedural, then it will apply the law of the forum, i.e., Minnesota law, without further analysis. See Davis v. Furlong, 328 N.W.2d 150, 153 (Minn. 1983) ("[Minnesota follows] the almost universal rule

that matters of procedures and remedies [are] governed by the law of the forum state."). However, if the court concludes that the law involved is substantive, then it must apply the five choice-influencing factors first articulated by the Minnesota Supreme in Milkovich v. Saari: (1) predictability of result; (2) maintenance of interstate order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; (5) application of the better rule of law. 203 N.W.2d 408, 412 (Minn. 1973).[1]

Here, there is an apparent conflict between the laws of Minnesota and Missouri regarding the limitations period that would apply to Dorgan's claims. Under Minnesota law, all employment compensation and wage-related claims are subject to a two-year statute of limitations. See Minn. Stat. § 541.07(5); Kulinski v. Medtronic Bio-Medicus, Inc., 112 F.3d 368, 371 (8th Cir. 1997) ("Minnesota courts consistently hold that 'all damages arising out of the employment relationship are subject to [§ 541.07(5)].'") (citation omitted); Portlance v. Golden Valley State Bank, 405 N.W.2d 240, 243 (Minn. 1987); ("Nice distinctions between wages and lost income do not change the nature of the claim. ... [T]he gravamen of the action is the breach of an employment contract, and the claim is essentially a claim for wages subject to the two-year limitation prescribed by section 541.07 (5)."). Under Missouri law, however, "all contracts actions in which the plaintiff seeks a judgment from the defendant for payment of money the defendant agreed to pay in a written contract" are subject to a ten-year limitations period. Hughes Development Co. v. Omega Realty Co., 951 S.W.2d 615, 617 (Mo. 1997) (en

[1] Finally, as a general matter, the court must bear in mind the requirements of the federal constitution when conducting the foregoing analysis. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) ("'State [applying its own law to action] must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

banc) (interpreting Mo. Rev. Stat. § 516.110)). Sprint strongly disagrees that this ten-year limitations period would apply to Dorgan's claim under Missouri law, and Dorgan has offered only conclusory assertions that it does. For purposes of this analysis, however, the court will assume that an actual conflict exists between the laws of Minnesota and Missouri.

The next step requires the court to determine whether the law involved is procedural or substantive. In most circumstances, Minnesota courts consider statutes of limitations procedural, see Davis, 328 N.W.2d at 153; U.S. Leasing Corp. v. Biba Information Processing Services Inc., 436 N.W.2d 823, 825 (Minn. Ct. App. 1989) (holding that limitations period of forum controls unless choice of law relating to remedy is expressly agreed upon in contract). Minnesota law recognizes a narrow exception to the general rule that statutes of limitations are procedural: when a limitation period "does not merely bar the remedy for the violation of a right, but limits or conditions the right," it is considered substantive. See Fredin v. Sharp, 176 F.R.D. 304, 308 (D. Minn. 1997). This exception typically applies when a statute creating a specific right contains its own limitations provision. See id. However, despite Dorgan's argument to the contrary, Missouri's ten-year statute of limitations, Mo. Rev. Stat. § 516.110, does not fall within this narrow exception. Section 516.110 does not create a specific right. Rather, it broadly provides for a ten-year limitations period for any existing cause of action involving "any writing, whether sealed or unsealed, for the payment of money or property." See generally Hughes Development Co. v. Omega Realty Co., 951 S.W.2d 615, 617 (Mo. 1997) (listing the variety of causes of actions to which § 516.110 has been found to apply). In fact, the Missouri Supreme Court has expressly held, consistent with the approach of the Minnesota Supreme Court, that "statutes of limitation are procedural rather than substantive." Goodman v. St. Louis Children's

Hosp., 687 S.W.2d 889, 891 (Mo. 1985) (en banc) (citing precedent).

Having concluded that the statute of limitations issue here implicates procedural law, the court is required to apply Minnesota law without further analysis. Dorgan's claims under the original compensation scheme accrued more than five years ago. Under Minnesota law, these employment compensation claims are barred by the two-year statute of limitations provided in Minn. Stat. § 541.07(5). Therefore, because Sprint possesses a valid statute of limitations defense, the court will deny Dorgan's Rule 41(a)(2) motion for voluntary dismissal. For the same reason, the court will grant Sprint's motion pursuant to Rules 12 and 56.[2]

---

[2] Neither party objects to the magistrate judge's recommendation that Dorgan's motion to transfer pursuant to 28 U.S.C. § 1406(a) be denied. After a de novo review, the court will adopt the magistrate's recommendation regarding the transfer question. The court additionally notes that since the Supreme Court's decision in Stewart Organization v. Ricoh Corp., 487 U.S. 22 (1988), motions to transfer involving a forum selection clause have been analyzed under § 1404 rather than § 1406. See, e.g., Crescent Int'l, Inc. v. Avatar Communities, Inc., 857 F. 2d 943, 944 (3d Cir. 1988) ("[I]n Ricoh, the Court said that Section 1406 does not apply when, as here, venue is proper."); Terra Int'l v. Mississippi Chem. Corp., 119 F.3d 688 (8th Cir. 1997) (analyzing effect of forum selection clause on transfer issue under § 1404 (a). And under § 1404(a), the law of the transferor court applies, Wisland v. Admiral Beverage Co., 119 F. 3d 733, 735 (8th Cir. 1997), so that this case would be procedurally barred in any event. Further, courts have repeatedly rejected motions to transfer by plaintiffs "whose own failure to pursue its claim diligently and to research [the forum's] statute of limitations has resulted in a procedural bar." Spar, Inc. v. Information Resources, Inc., 956 F.2d 392, 393-94 (2d Cir. 1992); see also Cote v. Wadel, 796 F.2d 981, 985 (7th Cir. 1986) ("The proper penalty for obvious mistakes that impose costs on opposing parties and on the judicial system is a heavy one.").

CONCLUSION

Based on a de novo review of the file and record, **IT IS HEREBY ORDERED** that:

1. Plaintiff's motion to transfer venue to the Western District of Missouri pursuant to 28 U.S.C. § 1406(a) (Doc. No. 7) is denied.

2. Plaintiff's motion to dismiss without prejudice pursuant to Rule 41(a) (Doc. No. 7) is denied.

3. Defendant's motion to dismiss or for summary judgment pursuant to Rules 12 and 56 (Doc. No. 10) is granted.

4. Plaintiff's suit is dismissed with prejudice.

Dated: May 12, 1999

s/
David S. Doty, Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-2660MNMI

Daniel P. Dorgan,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and for Rehearing
	*	En Banc
Sprint/United Management	*	
Company,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
(5128-010199)

June 28, 2000

Order Entered at the Direction of the court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Court File No. 98-2078 DSD/JMM

In the Matter of:

Daniel P. Dorgan,
Plaintiff,

v.

Sprint/United Management Company,
Defendant.

DEFENDANT SPRINT/UNITED MANAGEMENT COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO RULE 12 OR FOR SUMMARY JUDGMENT UNDER RULE 56

TO: PLAINTIFF DANIEL P. DORGAN, and his attorney, JOHN R. DORGAN, Esq., 1518 East Lake Street, Suite 210, Minneapolis, MN 55407.

NOTICE OF MOTION

PLEASE TAKE NOTICE that pursuant to Rule 12 and Rule 56 of the Federal Rules of Civil Procedure, on a date and time to be specified by the Court, before the Honorable United States District Court Judge DAVID S. DOTY, Defendant Sprint/United Management Company, by and through counsel, will move the Court for an order:

1. Dismissing Plaintiff's Complaint pursuant to Rule 12(b)6 for failure to state a claim upon which relief can be granted. Plaintiff's claims are all barred by the applicable statute of limitations. This Court should therefore dismiss his Complaint.

2. In the alternative, dismissing Plaintiff's Complaint pursuant to Rule 56 based upon the same reason; and

3. For such other and further relief as the Court deems just and equitable. This Motion will be based upon all the files, records and proceedings herein, and upon the legal memoranda and any affidavits to be submitted by the parties. Oral argument is requested.

MOTION

Defendant, Sprint/United Management Company., hereby moves the Court for an Order:

1. Dismissing Plaintiff's Complaint it its entirety pursuant to Rule 12;

2. In the alternative, dismissing Plaintiff's Complaint pursuant to Rule 56;

3. For such other and further relief as the Court deems just and equitable. This Motion will be based upon all the files, records and proceedings herein, and upon the legal memoranda and any affidavits to be submitted by the parties, and oral argument.

DATED: October 8, 1998

HALLELAND LEWIS NILAN
SIPKINS & JOHNSON, P.A.

By /s/

John M. Elliott Reg. No. 201911
Sandra L. Schlafge Reg. No. 240746
Pillsbury Center South, Suit 600
220 South Sixth Street
Minneapolis, Minnesota 55402-4501
(612) 338-1838

ATTORNEYS FOR DEFENDANT
SPRINT/UNITED MANAGEMENT
COMPANY

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Daniel P. Dorgan,

Plaintiff,

v.

Sprint/United Management Company,

Defendant.

Court File No. 98-2078 DSD/JMM
Case Type: Contract

NOTICE OF DISMISSAL

TO: DEFENDANT ABOVE-NAMED, SPRINT/UNITED MANAGEMENT COMPANY, AND ITS ATTORNEYS, JOHN M. ELLIOTT AND HALLELAND, LEWIS, NILAN, SIPKINS & JOHNSON, PILLSBURY CENTER SOUTH, SUITE 600, 220 SOUTH SIXTH STREET, MINNEAPOLIS, MINNESOTA 55402-4501

NOTICE IS HEREBY GIVEN that Daniel P. Dorgan, the above-named plaintiff, hereby dismisses this action, pursuant to F.R.C.P. Rule 41 (a)(1).

Dated: 11/20/98

/s/
John R. Dorgan
Attorney License No. 134557
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Minneapolis, Minnesota 55407
(612) 729-1943
FAX: (612) 722-3152
ATTORNEY FOR PLAINTIFF

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Sandra L. Schlafge, Esq.
Direct Dial: 612.204.4163
E-Mail: sschlafge@hlnsj.com

November 23, 1998

VIA FACSIMILE & U.S. MAIL

Magistrate Judge John M. Mason
610 Federal Courts Building
316 North Robert Street
St. Paul, MN 55101

Dear Judge Mason:

Re: *Dorgan v. Sprint United Management Co.*
Court File No.: 98-2078 DAD/JMM
Our File No. 40000/005

I am an attorney representing the defendant Sprint in the above-referenced matter. I am writing to inform the Court of our opposition to Plaintiff's Notice of Dismissal which was mailed to us on Friday, November 20. Plaintiff is attempting through the filing of this Notice to voluntarily dismiss this case pursuant to F.R.C.P. 41(a)(1). A dismissal under this rule would normally be without prejudice. However, Plaintiff is not entitled at this stage to obtain a dismissal under that provision, which allows a dismissal without order of the

Court "at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs..."

In this case, Sprint served a Notice of Motion and Motion to Dismiss pursuant to Rule 12 or for Summary Judgment under Rule 56 upon Plaintiff on October 8th, 1998, based on its statute of limitations defense which completely bars Plaintiff's action in this jurisdiction. Since Sprint served this motion for summary judgment many weeks prior to Plaintiff's effort to seek a voluntary dismissal, Plaintiff's Notice of Dismissal is untimely and fails to comply with the requirements of the plain language of Rule 41(a)(1).

We strongly believe that Sprint is entitled to a dismissal with prejudice of this entire action, in light of its statute of limitations defense. We also believe that Plaintiff is seeking a voluntary dismissal without prejudice in order to escape our statute of limitations defense, and in order to re-file this same action in another jurisdiction. Consequently, if Plaintiff is allowed to proceed with obtaining a voluntary dismissal despite his failure to comply with Rule 41(a)(1), Sprint will be greatly prejudiced.

Therefore, we have proceeded today to serve upon Plaintiff our memorandum of law in support of our motion, as was previously arranged with Plaintiff. We would like to proceed with this motion and have the Court dismiss this action with prejudice. Please let us know if you would like us to participate in a conference call or appear before the Court to further discuss these Rule 41 issues. Thank you for your consideration of the concerns we have raised in this letter.

Sincerely,

/s/

Sandra L. Schlafge
SLS/pmp

cc: John R. Dorgan, Esq.
John M. Elliott, Esq.
Clerk of Court

John R. Dorgan
Attorney at Law
Suite 210
1518 East Lake Street
Minneapolis, Minnesota 55407

(612) 729-1943 (BUS)
(612) 722-3152 (FAX)

December 1, 1998

Magistrate Judge John M. Mason
610 Federal Court Building
316 North Robert Street
St. Paul, Minnesota 55101

Re: Dorgan v. Sprint/United Management Company
Court File No. 98-2078 DAD/JMM
Out- File No. 98-103-01

Dear Judge Mason:

I am the attorney representing Daniel P. Dorgan, the plaintiff in the above-referenced matter. I am writing this letter to respond to the November 23, 1998, letter from Sandra Schlafge, one of Sprint's attorneys, objecting to the Notice of Dismissal that was filed by the plaintiff on November 20, 1998. Contrary to Ms. Schlafge's assertions, I believe the Notice of Dismissal did act to allow the plaintiff to voluntarily dismiss this action. If that is not the case, then I believe this letter and the enclosed documents should be sufficient to allow you to dismiss the case without prejudice. If not, please so inform me and we will immediately bring a motion for that purpose.

This action involves Sprint's retroactive changes to its "Variable Incentive Compensation Plan" in 1993. The changes to the Plan retroactively reduced Mr. Dorgan's compensation, which we believe was an improper action by Sprint.

For a few months before this lawsuit was started, we were dealing with Sprint in an attempt to resolve this matter without a lawsuit. One of the things we were trying to do was to get a copy of the Plans in question (i.e., the original and the changed Plan(s)). Nancy Dixon, the attorney at Sprint's headquarters in Kansas City that I was dealing with, was very willing to try and resolve this matter, but she seemed so swamped with work that she could never obtain or provide us with copies of the Plans.

Since we started the lawsuit, we have continued to discuss settlement with Sprint's local attorneys. We were finally provided with copies of two versions of the Plan about three weeks ago. See the November 5, 1998, cover letter from John M. Elliott. Paragraph IX on page 5 of each version of the Plan provides that Missouri law is to apply to the construction of the Plan and that jurisdiction and venue are vested in the state or federal courts in Jackson County, Missouri. We are therefore seeking to dismiss this action without prejudice so we can institute an action in Jackson County, Missouri.

I filed a Notice of Dismissal, rather than a motion to dismiss, because I believed that Sprint had not properly served its motion for summary judgment so as to avoid the automatic effect of plaintiff's Notice of Dismissal. Under Local Rule 7.1 (b)(2)(A), Sprint should have served a memorandum of law, affidavits and exhibits, along with a proposed order, with its motion. Two copies of Sprint's cover letter were also to have been filed with the court. Sprint's attorneys apparently also believed that proper service of the summary judgment motion

would not be effectuated until supporting documentation was served and the copies of the cover letter were filed with the court, since we were notified ahead of time when Sprint was going to serve its memorandum of law. See November 2, 1998, letter from John M. Elliot. Even after that letter was sent, we continued to discuss settlement with Sprint. We filed the Notice of Dismissal on November 20, 1998, to hopefully avoid having to make a formal motion for that purpose after the memorandum of law was filed on November 23, 1998. By filing the Notice of Dismissal, I certainly never meant to violate any rule or otherwise act improperly.

Again, if this action has not already been dismissed, and if this letter and the enclosed documents are not sufficient to convince you to issue an order for dismissal without prejudice, please let me know and I will prepare formal motion documents for that purpose.

Thank you.

Very truly yours,
/s/
John R. Dorgan

JRD: ml
Enclosures

cc: D. Dorgan
J. Elliott, Esq.
S. Schlafge, Esq.
Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA

December 7, 1998

John R. Dorgan, Esq.
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1518 East Lake Street
Minneapolis, MN 55407

John M. Elliott, Esq.
Halleland, Lewis, Nilan,
Sipkins & Johnson
Suite 600, Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402

Re: Daniel Dorgan v. Sprint/United Management Company Civil No. 98-2078 (DSD/JMM)

Dear Counsel:

The Court has received communications from counsel for the parties with respect to Plaintiff's desire to dismiss this action without prejudice. If the issue is presented to the Court by Motion, the District Court has directed that this Court consider the matter and issue a Report and Recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B).

Counsel for Plaintiff has inquired by letter as to whether a Motion is required. We provide with this letter a copy of an unpublished opinion of this Court which may be of guidance to the parties. If the parties are able to agree on the terms of an Order, it may be submitted to this Court for review. In the absence of agreement, the parties should proceed by way of formal Motion.

Sincerely,
/s/
John M. Mason

JMM:kmh

Enc. Daniel Hendrickson v. Dakota County Sheriff's Department, et al.
Civil No. 4-94-849, 1/12/96 Report and Recommendation

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

DANIEL MARK HENDRICKSON, CIVIL NO. 4-94-849

Plaintiff,

v. REPORT AND RECOMMENDATION

DAKOTA COUNTY SHERIFF'S DEPARTMENT, DANIEL SCHEUERMANN,

Defendants.

Daniel Mark Hendrickson, pro se.

Kenneth A. Malvey, Esq., Assistant Dakota County Attorney, on behalf of Defendants Dakota County Sheriff's Department and Daniel Scheuermann.

Plaintiff filed a Complaint pursuant to 42 U.S.C. § 1983 alleging that Daniel Scheuermann, a Dakota County Deputy Sheriff, assaulted and battered him. Before the Court is Plaintiff's motion to dismiss without prejudice [Docket No. 9] and Defendant's motion to dismiss with prejudice [Docket No. 10]. The matter is properly before the undersigned United States Magistrate Judge for Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1. For the reasons detailed below, this Court recommends granting Plaintiff's motion and denying Defendant's motion.

PROCEDURAL BACKGROUND

On September 30, 1994, Plaintiff Daniel Mark Hendrickson filed a 42 U.S.C. § 1983 action with this Court against the Dakota County Sheriff's Department and Daniel Scheuermann, a Dakota County Deputy Sheriff. On October 11, 1994, Plaintiff also filed an application to proceed in *forma pauperis*. Plaintiff's application was granted and summons was served on Defendants. On August 16, 1995, Plaintiff made a motion to dismiss without prejudice [Docket No. 9]. On August 18, 1995, Defendants made a motion to dismiss with prejudice [Docket No. 10].

DISCUSSION

Plaintiff's Motion to Dismiss Without Prejudice

Before response to a complaint, a plaintiff has an automatic right to obtain a dismissal without prejudice. Fed. R. Civ. P. 41(a)(1). After response, permission to dismiss without prejudice becomes discretionary, and is subject to appropriate terms. Fed. R. Civ. P. 41(a)(2); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 394 (1990). The purpose of allowing a defendant to object to a dismissal under Rule 41(a)(2) is primarily to prevent voluntary dismissals that prejudice the defendant. Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984). The court considers factors such as defendant's effort and expense, plaintiff's diligence, rationale for dismissal, and whether defendant filed a summary judgment motion. Grover By Grover v. Eli Lilly & Co., 33 F.3d 716, 718 (6th Cir. 1994); Clark v. Tansey, 13 F.3d 1407, 1411 (10th Cir. 1993); Paulucci v. City of Duluth, 826 F.2d 780, 783 (8th Cir. 1987).

The court should deny the motion to dismiss without prejudice if granting the motion will prejudice the defendant. Paulucci, 826 F.2d at 783; Williams v. Ford Motor Credit

Co., 627 F.2d 158 (8th Cir. 1980). A court is more likely to grant a voluntary dismissal without prejudice if the proceedings are still at a preliminary stage. See Tyco Labs., Inc. v. Koppers Co., 627 F.2d 54 (7th Cir. 1980). Courts "generally will grant dismissals [without prejudice] where the only prejudice the defendant will suffer is that resulting from a subsequent lawsuit." Paulucci, 826 F.2d at 782 (citing Conafay By Conafay v. Wyeth Lab., 793 F.2d 968, 970-71 (8th Cir. 1984)).

This Court recommends granting Plaintiff's motion to dismiss without prejudice. Balancing Defendants' right to an immediate determination of the allegations, against the potential that the claim will not be pursued, the Court determines that there are other means to protect Defendants from prejudice, now and in the future. The Court mitigates Defendants' burden by imposing the condition of the payment by Plaintiff to Defendants all of their costs and legal fees incurred in the present action as a prerequisite to refiling. See Kern v. TXO Prod. Corp., 738 F.2d 968, 972 (8th Cir. 1984); Belle-Midwest, Inc. v. Missouri Property & Cas. Ins. Guar. Ass'n., 56 F.3d 977 (8th Cir. 1995).

Since the Plaintiff's Motion to Dismiss without prejudice is granted, the Court need not decide Defendants' Motion to Dismiss.

RECOMMENDATION

For the foregoing reasons, it is hereby recommended that:

1. Plaintiff's Motion to Dismiss without prejudice be granted, upon condition that Plaintiff certify that he has paid Defendants' costs and attorney's fees for the present action as a prerequisite to refiling [Docket No. 9].

2. Defendants' Motion to Dismiss with Prejudice [Docket No. 10] be denied.

Dated: January 12, 1996

JOHN M. MASON
United States Magistrate Judge

(2)

Supreme Court, U.S.
FILED
OCT 26 2000
CLERK

No. 00-475

In The

Supreme Court of the United States

DANIEL P. DORGAN,

Petitioner,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

17 pp

QUESTIONS PRESENTED

I. Was it error for the Court of Appeals to affirm the decision of the District Court to dismiss Petitioner's Amended Complaint, which Petitioner filed after he had filed a Fed. R. Civ. P. 41(a)(1) Notice of Dismissal?

II. Was it error for the Court of Appeals to affirm the District Court's decision to adopt the Magistrate's Report and Recommendation that Petitioner's motion to transfer under 28 U.S.C. § 1406(a) be denied on the ground that Petitioner had asserted proper venue in his Amended Complaint?

CORPORATE DISCLOSURE STATEMENT

Respondent Sprint/United Management Company is a wholly-owned subsidiary of Sprint Corporation, a publicly traded company.

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BRIEF IN OPPOSITION

Respondent Sprint/United Management Company ("Sprint") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's *per curiam* decision, affirming the dismissal of Petitioner's action on statute of limitations grounds. First, Petitioner abandoned his Rule 41(a) claim in the trial court. In addition, Rule 41(a)(1) only permits a voluntary dismissal *before* service of an answer or motion for summary judgment. Petitioner filed a notice of dismissal *after* Respondent served a motion for summary judgment. Second, 28 U.S.C. § 1406 does not authorize transfer of venue solely to avoid the bar of an applicable statute of limitations. There are no decisions by the Court, the Eighth Circuit or other courts that conflict with the Eighth Circuit's decision. Because precedent is clear and does not cause confusion, the petition should be denied.

STATEMENT OF THE CASE

A. Factual Background.

Sprint is a telecommunications company headquartered in Westwood, Kansas. Petitioner was a sales management employee in Sprint's Minnesota office. As part of his pay package, Petitioner was eligible to earn incentive compensation based upon generated revenue. Payments were calculated based on an incentive compensation plan distributed to Petitioner in the ordinary course of his management duties for Sprint. Disputing the amounts paid in 1993, Petitioner filed this action in

September 1998. Any sum truly in controversy is only a small fraction of the amount Petitioner claims.

Thinking that Minnesota's six-year contract statute of limitations governed his claims, Petitioner filed suit in Minnesota five years after Sprint allegedly failed to pay him his claimed incentive compensation. Once Petitioner learned that his claims were barred by the applicable two-year statute of limitations, Petitioner engaged in a variety of procedural moves in an effort to avoid the bar. This case is about the procedural morass Petitioner created when he tried to avoid Minnesota's applicable two-year statute of limitations.

B. Procedural Background.

Following service of the complaint, Sprint served a Notice of Motion and Motion to Dismiss under Rule 12 or for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure. The motion requested judgment based on the applicable statute of limitations. Sprint filed with the District Court copies of the October 8, 1998 cover letter serving its motion, as required by District of Minnesota Local Rule 7.1. On November 2, 1998, Sprint's counsel informed Petitioner that the briefing schedule would commence with the service of Sprint's opening memorandum of law on Monday, November 23, 1998.

On Friday, November 20, 1998, Petitioner filed a Notice of Dismissal under Federal Rule of Civil Procedure 41(a)(1). Sprint filed an objection to the Notice as improper under the express language of Rule 41 because

Sprint had served a summary judgment motion before the Notice was filed.

By letter dated December 7, 1998, Magistrate Judge John Mason advised the parties that if they were unable to agree to the terms of an Order for Dismissal, Petitioner should proceed by way of formal motion under Federal Rule of Civil Procedure 41(a)(2). Petitioner never filed a formal motion for dismissal without prejudice and never again raised the Notice in any pleading or at any hearing in the trial court.

Instead, on December 14, 1998, Petitioner served and filed an Amended Complaint, asserting the same causes of action against Sprint, but including new allegations regarding jurisdiction and venue. In paragraph 3 of his Amended Complaint, Petitioner alleged:

> Jurisdiction is proper in this court pursuant to U.S.C. § 1332 (diversity of citizenship and amount in controversy). Jurisdiction is also proper in the state or federal courts in Jackson County, Missouri, pursuant to 28 U.S.C. § 1332 and/or the incentive compensation agreement between the parties, as further described below.

In paragraph 4 of his Amended Complaint, Petitioner alleged:

> Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(1) and (c). Venue is also proper in the state or federal courts in Jackson County, Missouri, pursuant to 28 U.S.C. § 1391(a)(1) and (2) and/or the incentive compensation agreement between the parties, as further described below.

Sprint served an Amended Notice of Motion and Motion to Dismiss under Rule 12 or for Summary Judgment under Rule 56 on December 18, 1998. Sprint requested judgment on the Amended Complaint based upon the expiration of the statute of limitations. Petitioner responded to Sprint's original motion by serving and filing a responsive memorandum on December 14, 1998, which included an affidavit from Petitioner's counsel attaching copies of page 5 of Sprint's incentive compensation plan.

On January 7, 1999, Petitioner filed a motion to transfer venue to the Western District of Missouri pursuant to 28 U.S.C. § 1404. Sprint opposed the motion on the grounds that it was an attempt to escape the statute of limitations in Minnesota. Petitioner changed the statutory basis for his motion to 28 U.S.C. § 1406 and Magistrate Judge Mason allowed supplemental briefing as to the propriety of a transfer under that provision.

Oral argument on the cross-motions was heard on January 20, 1999. Magistrate Judge Mason also took under advisement an oral motion by Petitioner to dismiss the case without prejudice under Rule 41(a)(2).

On April 6, 1999, Magistrate Judge Mason issued a Report and Recommendation, in which he recommended that Petitioner's motion to dismiss under Rule 41(a)(2) be granted on the condition that Petitioner pay attorney's fees and costs. Magistrate Mason further recommended that Sprint's motion for summary judgment and Petitioner's motion to transfer venue be denied. Magistrate Mason found that Petitioner's Amended Complaint did not support his motion. He noted that in the Amended

Complaint, Petitioner "alleged that venue was proper in Missouri, but also in Minnesota." (Rpt. and Recommendation at p. 5). He further found that the "materials filed by Plaintiff in support of the motion also do not substantiate Plaintiff's current claim that venue is improper in Minnesota." (Rpt. and Recommendation at p. 5).

Sprint objected to the Report and Recommendation on the grounds that Petitioner's claims were barred by the applicable two-year statute of limitations and that dismissal under Rule 41(a)(2) would prejudice Sprint's defense. Petitioner lodged no separate objections to the Report and Recommendation, raising no issue regarding any of the Magistrate's rulings. On May 12, 1999, District Court Judge David Doty granted Sprint's motion and denied Petitioner's motion for dismissal under Rule 41(a)(2). Judge Doty also denied Petitioner's motion for a transfer of venue under 28 U.S.C. § 1406.

Petitioner appealed the District Court's judgment to the Eighth Circuit, which affirmed the judgment *per curiam* on May 18, 2000. The Eighth Circuit denied Petitioner's petition for rehearing and rehearing en banc on June 28, 2000.

REASONS FOR DENYING THE PETITION

I. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL.

Petitioner only belatedly decided to rely on Rule 41(a)(1) as a means to avoid dismissal based on the statute of limitations. In the trial court he never raised the issue of the Notice of Dismissal after the Magistrate ruled

that he could proceed under Rule 41(a)(2). Most significantly, Petitioner specifically acknowledged the District Court's jurisdiction in his Amended Complaint, which he filed almost a month after he filed the Notice of Dismissal. With the Amended Complaint, Petitioner submitted himself to the District Court's jurisdiction, thus abandoning any argument that the District Court lacked jurisdiction after the Notice of Dismissal was filed.

Further, after he served and filed his Amended Complaint, he invoked the District Court's authority by responding to Sprint's motion for summary judgment and by seeking an order transferring venue pursuant to 28 U.S.C. § 1404 and then 28 U.S.C. § 1406 and never raising the issue of the Notice. By his actions, Petitioner effectively abandoned the Notice in the trial court, which precluded him from resurrecting it on appeal. *See, e.g., Nelson v. J.C. Penney Co.*, 75 F.3d 343, 348 (8th Cir.), *cert. denied*, 519 U.S. 813 (1996); *In re Control Data Corp. Sec. Litig.*, 933 F.2d 616, 622 (8th Cir. 1991); *Nat'l Assoc. of Gov't Employees v. City Public Serv. Bd. of San Antonio, Texas*, 40 F.3d 698, 706 (5th Cir. 1994). Petitioner's service and filing of an Amended Complaint, subsequent to the service and filing of his Notice of Dismissal is dispositive of the issue of the effect of Petitioner's Rule 41(a)(1) Notice of Dismissal on the District Court's jurisdiction.

Nor was the Notice of Dismissal successful on its own to dismiss the case. Rule 41(a)(1) limits a plaintiff's ability to dismiss an action. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 394 (1990). A plaintiff's right to dismiss a case under Rule 41(a)(1) ends when a defendant has served an answer or a motion for summary judgment. *Id.*

A defendant actively engaged in defending a claim on the merits makes a unilateral dismissal prejudicial. *Safeguard Business Systems, Inc. v. Hoeffel*, 907 F.2d 861, 863 (8th Cir. 1990). ("We have held that Rule 41 is designed to 'fix the point at which the resources of the court and the defendant are so committed that dismissal without preclusive consequences can no longer be had as of right.' "), *Exxon Corp. v. Maryland Casualty Co.*, 599 F.2d 659, 662 (5th Cir. 1979) (after defendant has become "actively engaged in the defense," suit cannot be terminated without consent, court permission, or dismissal with prejudice).

Sprint titled its motion "Notice of Motion and Motion to Dismiss Pursuant to Rule 12 or for Summary Judgment Under Rule 56." Sprint clearly sought a final adjudication on the merits, based on the affirmative defense that Petitioner's claims were barred by the statute of limitations. Sprint's motion engaged Petitioner on the merits and requested a final judgment on the facts and law that Petitioner's claims were stale.

More importantly, Petitioner responded to Sprint's motion,[1] appending to his response copies of the choice of law provisions from the incentive compensation agreement he had sought to have the District Court consider. A motion to dismiss pursuant to Rule 12(b)(6) is treated as a motion for summary judgment when matters outside the pleadings are presented and not excluded by the trial court. *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992);

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[1] Petitioner's response to Sprint's motion is another indication that Petitioner abandoned his position that the District Court had no jurisdiction to hear the motion.

Kurkowski v. Volcker, 819 F.2d 201, 203 (8th Cir. 1987). Throughout the proceedings in the District Court, Sprint had a pending summary judgment motion. The decisions are consistent in holding that a Rule 41(a)(1) notice is ineffective when a summary judgment motion is pending. *See, e.g., Hamm v. Rhone-Poulenc Rorer Pharm., Inc.*, 187 F.3d 941, 948 (8th Cir. 1999) (statements of plaintiffs' counsel at oral argument raising new facts not alleged in pleadings constituted "matters outside the pleadings"), *cert. denied*, 120 S. Ct. 937 (2000); *Yosef v. Passmaquoddy Tribe*, 876 F.2d 283, 286 (2d Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990) (exhibit appended by plaintiff in response to statute of limitations argument not excluded by court and Rule 12(b)(6) motion converted to one for summary judgment).

Consequently, contrary to Petitioner's position, the circuit courts have not interpreted Rules 12, 56, and 41 inconsistently. Rather, as here, where a plaintiff has either abandoned a position or a motion for summary judgment is pending, the right to dismiss pursuant to Rule 41(a)(1) is terminated.

II. THE EIGHTH CIRCUIT PROPERLY UPHELD THE DISTRICT COURT'S DECISION DENYING PETITIONER'S MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1406(a).

When a case is filed in a venue other than that specified in a contract, a forum selection clause is a significant factor "that figures centrally in the district court's calculus" when considering a motion to transfer under 28 U.S.C. § 1404(a). *Stewart Organization, Inc. v.*

Ricoh Corp., 487 U.S. 22 (1988). Section 1406 does not apply to the analysis of a forum selection clause where venue is proper in the transferor court. *Id.* at 28 n.8.

Since *Ricoh*, motions to transfer involving a forum selection clause have been analyzed under § 1404. *See, e.g., Terra Int'l v. Mississippi Chem. Corp.*, 119 F.3d 688 (8th Cir.) (analyzing effect of forum selection clause on transfer issue under § 1404(a), *cert. denied*, 522 U.S. 1029 (1997)); *Crescent Int'l Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944 (3d Cir. 1988) ("[I]n *Ricoh*, the Court said that Section 1406 does not apply when, as here, venue is proper."). Under § 1404(a), in the event of a transfer, the law of the transferor court applies. *Wisland v. Admiral Beverage Co.*, 119 F.3d 733, 735 (8th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998).

In his Amended Complaint, Petitioner asserted that venue was proper in Minnesota or Missouri. Because his claim would be barred under the Minnesota statute of limitations, Petitioner sought an order transferring the case to Missouri pursuant to § 1404. Realizing that the two-year Minnesota statute of limitations would apply even if the case were transferred, Petitioner then resorted to § 1406 to evade the otherwise inevitable dismissal of his lawsuit.

Courts have repeatedly rejected motions to transfer by plaintiffs "whose own failure to pursue its claim diligently and to research [the forum's] statute of limitations resulted in a procedural bar." *Spar, Inc. v. Information Resources, Inc.*, 956 F.2d 392, 393-94 (2d Cir. 1992); *see also Cote v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986). In *Spar*, the plaintiff moved for a § 1406 transfer from the Southern

District of New York to the Northern District of Illinois. Although venue was otherwise proper in New York, the plaintiff argued that "Illinois's longer limitations period would enable [plaintiff] to pursue the action on the merits." 956 F.2d at 392. The court concluded, however, that the plaintiff's "own failure to pursue its claim diligently" was not a proper basis for a § 1406 transfer. *Id.* The court unequivocally rejected what it characterized as the plaintiff's obvious attempt to forum shop, or "bargain hunt" for a better venue, under the guise of a § 1406 transfer. *Id.* at 395. Similarly, Petitioner's motion was rejected in this case.

Petitioner incorrectly suggests that merely because the Eighth Circuit did not enforce the forum selection clause, its decision in this case contradicts its previous decision in *M.B. Restaurants, Inc.* v. *CKE Restaurants, Inc.*, 183 F.3d 750 (8th Cir. 1999). The issue in *M.B. Restaurants* was whether the forum selection clause was invalid for fraud. *Id.* at 752. The Eighth Circuit affirmed the district court's order, dismissing the case based on the forum selection clause, holding that the allegations of fraud were insufficient to overcome a presumption of validity. *Id.* at 753. By contrast, in this case, Petitioner, having chosen the forum in which to prosecute his action, later sought to enforce the forum selection clause to avoid dismissal under the applicable statute of limitations. The decision in *M.B. Restaurants* in no way contradicts the decision to deny Petitioner's motion in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 26, 2000

Respectfully submitted,

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